

Equal Protection for the Poor: Fair Distribution to Meet Brutal Needs

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Equality is . . . the leading feature of the United States. . . [T]hat vast extent of unpeopled territory which opens to the frugal and industrious a sure road to competency and independence will effectually prevent for a considerable time the increase of the poor or the discontented, and be the means of preserving that equality of condition which so eminently distinguishes us.¹

Two hundred years ago the framers of the United States Constitution considered the relative equality of "citizens"² to be a great source of national strength. Those who had visited England and France were conscious of the extremes in wealth and poverty that characterized those countries.³ They apparently shared the confidence expressed by Charles Pinkney that availability of open land would sustain the equality which was the bedrock of their democracy.⁴

In less than one hundred years some of the early assumptions of equality gave way. The institution of slavery became, as Gouverneur Morris predicted at the Constitutional Convention, "the curse of

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1. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 184 (A. Koch ed. 1966) (quoting Charles Pinkney).

2. I use the term "citizens" to distinguish the attitude towards slaves, which was based on assumptions of inequality that cannot be reconciled with the rosy picture of equality painted by Mr. Pinkney, who was one of the South Carolina representatives at the Constitutional Convention. *See id.*

3. *See* F. McDONALD, NOVUS ORDO SECLORUM, THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 93 (1985).

4. *See* J. MADISON, *supra* note 1.

heaven on the states where it prevailed.”⁵ While the principle of equal protection became explicitly incorporated into the Constitution, the nineteenth century conception of equality still did not address the sphere of public welfare benefits.

Although equality has been a consistent theme in American constitutional history, neither the participants in the Constitutional Convention nor the authors of the Civil War Amendments were asked to consider a conception of equality which constrained government distribution of basic goods and services. Once it is understood, however, that historical thinking about equality was grounded on assumptions about the ability to move west and become a farmer, then it is possible to ask about the implications of a change in those underlying assumptions.

The welfare state is a twentieth century phenomenon that necessitates new thinking about the meaning of equal protection. Throughout this century, however, the United States Supreme Court has been preoccupied with concerns about “substantive due process.”⁶ In recent decades the Court has been guided by principles developed to protect state and federal legislation from efforts to “constitution-ize” a laissez-faire economy.⁷ The fear of using the Constitution to “embody a particular economic theory”⁸ has led both commentators and the Court to avoid legal principles which reflect concern for potential welfare recipients.

Judicial intervention to protect welfare interests has been understandably limited. Prevailing wisdom built upon an assumption that “classifications bearing on nonconstitutional interests — even those involving ‘the most basic economic needs of impoverished human beings,’ — generally are not subject to special treatment under the Equal Protection Clause; they are not distinguishable in any relevant way from other regulations in ‘the area of economics and social welfare.’”⁹ But there is a clash between the spirit of equality and an approach which purports to place “legislative classifications impinging upon . . . survival on the same plane as a refusal to let a merchant hawk his wares on a particular street corner.”¹⁰ As Justice Blackmun wrote: “Only a pedant would insist that there are *no*

5. *Id.* at 411.

6. See *Lochner v. New York*, 198 U.S. 45 (1905).

7. *Id.* at 75. As noted by Justice Holmes in dissent, *Lochner* was “decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statistics. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire.” *Id.*

8. *Id.*

9. *Plyler v. Doe*, 457 U.S. 202, 232 (1982) (Blackmun, J., concurring) (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

10. *Lyng v. Castillo*, 106 S. Ct. 2727, 2732 (1986) (Marshall, J., dissenting).

meaningful distinctions among the multitude of social and political interests regulated by the [states]."¹¹

The challenge is to identify coherent principles which enable the justices to make the "relevant" distinctions they seek. Early formulations of a "right" to welfare benefits were too controversial to be accepted by a Supreme Court majority.¹² Furthermore, the need for government flexibility is real enough to make the courts appropriately wary of creating constitutional straight jackets. Therefore, it is important now to identify an alternative approach that recognizes both the government interests and the individual needs that are at stake, an approach that resolves the tension¹³ between "mere rationality" and "welfare rights."

This Article proposes a principle of equal protection based on a "fair distribution" of basic government services and benefits to those with "brutal needs." The first section identifies the theoretical perspectives of constitutional interpretation that influenced the analysis. The second section examines historical developments that have created the need to revise conceptions about the constitutional treatment of welfare assistance. Part three reviews doctrinal arguments that demonstrate the efforts and frustrations in articulating acceptable standards for Supreme Court review of these questions. In the final section, the theoretical framework is applied in an effort to resolve the doctrinal problems encountered by the Court.

11. *Plyler*, 457 U.S. at 233 (Blackmun, J., concurring) (emphasis added). This line from Justice Blackmun's concurring opinion in *Plyler* immediately followed his cautionary note that the Court must base its decisions on "relevant" distinctions. See *supra* note 9.

12. See Michelman, *The Supreme Court, 1968 Term—Forward: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) [hereinafter Michelman, *Supreme Court*]. As John Hart Ely notes, "the retreat from the once glittering crusade to extend special constitutional protection to the poor has turned into a rout." J. ELY, *DEMOCRACY AND DISTRUST* 148 (1980). Nevertheless, efforts to revive the theory that welfare benefits warrant special constitutional protection continue. See, e.g., Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659 (1979) [hereinafter Michelman, *Welfare Rights*]; Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977); Nelson, *Wealth Classifications and Equal Protection: Quo Vadimus?*, 19 Hous. L. REV. 713 (1982); Antieau, *The Jurisprudence of Interests and Adjudication of Equal Protection Controversies*, 57 U. DET. J. URB. L. 831 (1980).

13. Professors Laurence Tribe and Frank Michelman refer to the tension within the "rhetoric, reasoning, and results" of Supreme Court opinions. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1074 (1978); Michelman, *Welfare Rights*, *supra* note 12, at 664. In this article I am addressing the tension between those Supreme Court opinions and a "strong" theory of welfare rights.

THEORETICAL FRAMEWORK

This Article has not been written with specific cases or legislation in mind,¹⁴ and I do not intend to advocate a particular result in an individual pending case. Instead, I am concerned with outlining an approach to judicial review of basic government assistance to the poor. This approach builds on a combination of concern for moral values, an understanding of the relationship between legal and social values in a dynamic society, and the appropriate constraints of legal principles.

The values underlying this analysis are based upon the importance of "primary social goods" for the "least advantaged."¹⁵ This emphasis was derived from the moral philosophers, especially from the Rawlsian interpretation of justice as fairness, and his ethics of mutual respect.¹⁶ Assuring minimum basic goods becomes an element of respect owed to all individuals in a just society.¹⁷ The value of equality is understood in terms of "minimum welfare"¹⁸ rather than as a broader egalitarian concept.

While it is tempting to begin with this value and to convert it into a claimed right of minimum welfare, problems remain in efforts to link this theoretical standard with constitutional doctrine. Although claims have been made that this basic principle has survived judicial scrutiny,¹⁹ there is still a gap between the "strong right" articulated and the tenuous language of the Court.²⁰ As a result, it is appropriate to search for theoretical support in less absolute terms.

An alternative approach appears in the description of pragmatic instrumentalism²¹ which links classical figures such as Oliver Wendell Holmes, Jr., Roscoe Pound, Jerome Frank and Karl Llewellyn

14. For an article which addresses the question of the specific cases involved in this analysis, see Note, *Intermediate Equal Protection Scrutiny of Welfare Laws that Deny Subsistence*, 132 U. PA. L. REV. 1547 (1984). The case most carefully analyzed in that article was *Price v. Cohen*, 715 F.2d 87 (3d Cir. 1983), which upheld the Pennsylvania category of "transitionally needy." The Court of Appeals in that case had expressed "considerable doubt" about the traditional rational basis doctrine of the Supreme Court, but nevertheless felt constrained to apply that standard and to uphold the legislative classification. *Id.* at 96. The student comment which addressed that case advocated use of heightened equal protection scrutiny in a manner generally consistent with the theory developed in this paper. See Note, *supra* note 14.

15. See J. RAWLS, *A THEORY OF JUSTICE* 90-95 (1971). See also Michelman, *Supreme Court*, *supra* note 12; Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) [hereinafter Michelman, *Pursuit*]; Michelman, *Welfare Rights*, *supra* note 12.

16. See J. RAWLS, *supra* note 15, at 251-57. Rawls, in turn, traces the roots of his analysis to Immanuel Kant.

17. *Id.*

18. Michelman, *Supreme Court*, *supra* note 12, at 9.

19. *Id.* at 663.

20. See, e.g., *infra* text following note 168.

21. R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982).

into what has been described as the "dominant theory of law in America during the middle decades of this century."²² Elements of pragmatic instrumentalism include an empirical emphasis and a focus on "law as a means to goals"²³ of realizing prevailing "wants and interests."²⁴ While avoiding some of the excesses of the instrumentalists,²⁵ especially their occasional insistence on strict, quantitative, utilitarian analysis,²⁶ I accept their willingness to evaluate law in relationship to social goals. This emphasis, in turn, accepts the significance of social change as a basis for reevaluating an interpretation of law. "The instrumentalists . . . viewed preexisting law as less than all-encompassing and social change as a major stimulus to legal change [O]ccasions to modify old law and to make wholly new law arise from the dynamism of society."²⁷ It is that element of the pragmatic instrumentalist tradition that I will call upon for a re-evaluation of constitutional analysis in the welfare context.

In addition to accepting the empirical and pragmatic aspects of American jurisprudence, I also accept the emphasis that has been placed on the democratic process as a primary basis for constitutional analysis.²⁸ Two factors traditionally have been cited as guides to the exercise of judicial authority: 1) courts should apply close scrutiny when reviewing legislation that impinges upon the democratic process; and 2) courts should protect "discrete and insular minorities" from discrimination by the majority.²⁹ These principles can be brought to bear separately on the basic needs issue: One can focus on the need for education, food, health or access to the courts as a prerequisite to political participation; or one can focus on the poor (or sub-groups within the poor) as minorities in need of protection from majoritarian politics.

The second of these two approaches has attracted critical commentary. John Hart Ely, for instance, would treat racial discrimination differently from discrimination against the poor by distinguish-

22. *Id.* at 26.

23. *Id.* at 78.

24. *Id.* at 43.

25. *Id.* at 50-54.

26. My willingness to combine references to Summers and Rawls should be understood to imply rejection of the strict utilitarian aspects of pragmatic instrumentalism.

27. R. SUMMERS, *supra* note 21, at 83-84.

28. See J. ELY, *supra* note 12.

29. *Id.* at 75-77. The primary source cited by Ely (and many others) for this principle is footnote 4 in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

ing "a sadistic desire to keep the miserable in their state of misery, or a stereotypical generalization about their characteristics" (factors which Ely associates with racial discrimination) from "insensitivity" and "a reluctance to raise the taxes needed to support such expenditures."³⁰ The example, however, illustrates the limits of a rigid, all-or-nothing approach. The line between sadism and insensitivity is not only hard to draw, it is also difficult to defend.³¹ If a minority group (in this case the poor) is discriminated against in whole or in part because of either the contempt or the indifference of the political majority, then majoritarian democracy has failed to establish acceptable standards of justice. This is especially true when life and health are at stake. (Was Marie Antoinette hostile or indifferent?) While the protection afforded such a group may not be equivalent to that offered traditional victims of hostile racism, the bright lines are blurred, and at least some heightened scrutiny for such a group should be recognized.³²

Another reason given for refusing to treat the poor as a discreet and insular minority is the claim that "laws that actually classify on the basis of wealth" are relatively rare.³³ The focus of this analysis, however, is not on discrimination that separates *all* of the poor for hostile treatment. I am more concerned with classifications that, whether generated from hostility or indifference, have the effect of treating some of the poor differently from others in an unfair manner. Thus, I am assuming some legislative commitment to provide assistance, and I am concentrating on the fairness of the classifications created for the distribution of that aid.

The absence of bright lines to guide the Supreme Court gives rise to the fundamental problem of accepting judicial protection in this area. Judges are understandably reluctant to accept standards that appear to support unbridled discretion. To control that tendency I stress the importance of "principled analysis."³⁴ Discretion can be

30. J. ELY, *supra* note 12, at 162.

31. For a picture of the historical treatment of the poor as "moral pestilence", see *Edwards v. California*, 314 U.S. 160 (1941). For an account of the link between racism and poverty, see W. WILSON, *THE DECLINING SIGNIFICANCE OF RACE* (1978). As Wilson's statistics demonstrate, it is becoming increasingly apparent that traditional racial discrimination still continues through the more palatable guise of discrimination against the poor.

32. See Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981), for a further critique of the classifications recognized by Ely.

33. J. ELY, *supra* note 12, at 162.

34. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) [hereinafter R. DWORKIN, *RIGHTS*]. Professor Dworkin's theory is offered as an antidote to the unguided judicial discretion characterizing legal positivism, the most central and established legal theory in the United States since 1950. Positivism as defined by Professor H.L.A. Hart was based on the importance of determining the legitimacy of constitutional or legislative acts, and required adherence to those sources of law if promulgated and applied in a manner consistent with due process. Professor Hart, as a proponent of legal positivism,

controlled through a demand that judges maintain coherence in the development of legal principles on which their decisions are based.

Implied in this analysis is the distinction Ronald Dworkin makes between "principles" and "policies." Principles are standards required as elements of justice or fairness and they are a part of the body of law; policies generally reflect goals of improving the general welfare.³⁵ Arguments developed in this Article are based on a search for principles rather than on views about good social policy. While policy arguments may be persuasive in a legislative arena, I will accept the claim that they should not form the sole basis of judicial analysis.³⁶ In resolving constitutional problems, social policy arguments will be balanced on the side of the legislative judgment and not as a basis for overturning a legislative act. This emphasis on principles is intended to check the utilitarianism of the instrumentalists and to guide the analysis of democratic processes.³⁷

Legal principles are understood to change over time as a result of change in the social or economic conditions on which prior law was based.³⁸ Intellectual honesty, however, requires that judges identify such changes to ensure the coherence they seek between past and present decisions.³⁹ By extension, those who advocate particular resolution of a legal problem are obligated to relate their arguments to the established body of legal principles. Acceptance of those constraints is implied in the theoretical framework adopted in this paper.

Several additional assumptions influence the scope of this analysis. It is assumed that the fourteenth amendment is open-textured — its meaning is not limited to the ideas or purposes which may have been in the minds of those who drafted and ratified it in the 1860s.⁴⁰ No effort will be made to convince diehards committed to strict interpre-

recognized that in some circumstances legal terminology is unclear; in such circumstances he concluded that judicial discretion is appropriate. Professor Dworkin attempts to narrow that sphere of discretion by arguing that a coherent pattern of legal principles narrowly constrains judicial decisionmaking. *See also* R. DWORKIN, *A MATTER OF PRINCIPLE* (1985) [hereinafter R. DWORKIN, *PRINCIPLE*].

35. R. DWORKIN, *RIGHTS*, *supra* note 34, at 22.

36. *Id.* at 82-84.

37. *See* R. DWORKIN, *PRINCIPLE*, *supra* note 34, at 57-69. In other words, when Ely and Dworkin part company, I tend to agree with Dworkin.

38. This understanding is central to the "pragmatic instrumentalism" that has characterized twentieth century American jurisprudence. *See* Summers, *supra* note 21. It is also implicit in Dworkin's theory. *See* R. DWORKIN, *RIGHTS*, *supra* note 34.

39. For a description of the tasks Dworkin prescribes for his Judge Hercules, see R. DWORKIN, *RIGHTS*, *supra* note 34, at 105-30.

40. *See* J. ELY, *supra* note 12, at 11-41.

tivism that their arguments are wrong.⁴¹ I will generally describe, however, social, economic and political changes that support reevaluation of the relationship between federal, state and local governments and programs to meet minimum welfare needs of the population. Changes of this nature are relevant (though not decisive) when explaining changes in perspective regarding the meaning of the fourteenth amendment.⁴² In that context I will not differentiate between federal and state responsibilities, and I will assume that principles applicable to the states through the fourteenth amendment also apply to the federal government.⁴³ Arguments favoring an alternative, stronger principle derived from state constitutional law will be noted but not developed.⁴⁴

When I use the term "principles" I am referring to them in the constructive sense.⁴⁵ They do not arise from a vision of natural law. They instead are derived from analysis of the relationships, conditions, and accepted assumptions of the society to which they are applied. In this same vein, I assume that Justices of the Supreme Court should strive to apply a coherent pattern of principles in arriving at judicial opinions.⁴⁶

My focus will be on arguments of principle that support Supreme Court protections against denial of fundamental benefits. This focus assumes that certain goods and services provided by the government can be described as fundamental. Health care, food, monetary assistance, education, housing or legal assistance might be included in such a definition.⁴⁷ I do not mean to suggest that all components

41. For a historical analysis by Ely, see *id.* For a discussion of the "framers' intent," see R. DWORKIN, *PRINCIPLE*, *supra* note 34, at 33-71.

42. This is not intended to imply freedom to pick and choose substantive principles for incorporation into the fourteenth amendment, but rather that the clauses of that amendment are capable of growth (see J. ELY, *supra* note 12, at 30 n.69) and understanding basic social and economic changes in society will help explain that growth. A specific example of this change is incorporated in Reich, *The New Property*, 73 *YALE L. J.* 733 (1964) (cited in *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970)).

43. Equal protection generally is considered implicit in the fifth amendment due process clause. See *Bolling v. Sharpe*, 347 U.S. 497 (1954); *United States Dep't. of Agric. v. Moreno*, 413 U.S. 528 (1973).

44. See *infra* note 199.

45. See R. DWORKIN, *RIGHTS*, *supra* note 34, at 159-68, for a distinction between "constructive" and "natural" models.

46. See *id.* at 87 for Dworkin's rejection of "intuitionistic" theory. In rejecting nihilist alternatives, I accept James Fishkin's statement that "[a] contested reasonableness is quite different than an arbitrary whim." J. FISHKIN, *JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY* 186 (1983). See also Rich, *Reassessing Legal Realism: A Response to Professor Nowak*, 22 *WASHBURN L.J.* 429 (1983).

47. It is tempting to focus on "equal opportunity" and to attribute higher status to education than to other goods or services linked to subsistence. The Court's recent opinion in *Plyler* would lend credence to that approach; however, I would not accept that distinction. As noted by Michelman: "Unaccompanied by subsistence or health or freedom from extreme environmental deprivation, how could educational offerings effectuate fair equality of opportunity?" Michelman, *Pursuit*, *supra* note 15, at 989. Dworkin

should be treated identically, or that the list is limited to this group. When I refer to minimum protection against economic hazard, or to basic public benefits, I have in mind goods and services of this nature.

This analysis leads to a principle of fair distribution for those fundamental benefits intended to meet brutal needs of the poor. I will explain why, as a result of social and structural changes in the administration of government assistance, this principle warrants recognition. I also intend to show that recognition of this principle is appropriate in light of the doctrinal concerns of the Supreme Court as well as general principles of constitutional jurisprudence.

HISTORICAL BACKGROUND

The principle of equality was important to those who framed the Constitution, but it was not explicitly incorporated until the fourteenth amendment was adopted in 1868. Conceptions of the state's role prevalent at that time had been shaped when industry was in early stages of revolt.⁴⁸ Although an industrial economy was emerg-

makes a similar point when he rejects definitions of equality based solely on "fraudulent" equal opportunity concepts. "[M]arket allocations must be corrected in order to bring some people closer to the share of resources they would have had but for these various differences of initial advantage, luck, and inherent capacity." R. DWORKIN, PRINCIPLE, *supra* note 34, at 207.

The key identifying factor is whether the individual will be unable to satisfy basic needs that otherwise are provided by the government and are considered necessary for participation in the political and economic life of the society. The term "brutal needs" used as a reference to this standard first appeared in *Goldberg*, 397 U.S. at 261. It is symbolic of the broad range of basic needs discussed in this analysis.

I have included legal assistance in this list of basic needs, and in doing so, I reject Winter's criticism of the concept of "just wants" which suggests that if the poor really wanted legal counsel, "they will . . . purchase insurance against that risk" so that a "rule" guaranteeing the right to counsel regardless of one's means can be disposed of as superfluous." Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 69. The argument demonstrates Winter's inability to comprehend the pressures of poverty. When faced with immediate demands to satisfy basic wants, these demands will take precedence over aversion of risk; immediate needs will be given greater attention than future *potential* needs. This does *not* mean, however, that the reality of legal problems (or health care) are somehow important — only that *insurance* is not of high enough importance for the individual who lacks adequate resources to satisfy all basic immediate wants. When viewed from a perspective of society as a whole, however, legal needs and health care problems are constantly present (not just speculative future problems). Therefore, it is appropriate to develop social insurance programs which evaluate the relative importance of legal access or health care as if they were an immediate problem (not merely speculative risks) and from that perspective allocations to such programs would virtually always be given high relative priority.

48. See Woodard, *Reality and Social Reform: The Transition from Laissez Faire to the Welfare State*, 72 YALE L.J. 286 (1962).

ing, the majority of the population remained self-employed or engaged in agricultural labor.⁴⁹ Land remained accessible through the westward expansion envisioned in 1787,⁵⁰ offering at least a theoretical source of subsistence to anyone willing and able to make the move and adopt the common profession of the people.

State obligations to assist those in need were matched with nineteenth century social, economic, and political assumptions. Local governmental responsibility for public assistance had been assumed for more than two centuries under the Statute of Elizabeth⁵¹ and its colonial counterparts.⁵² Identification of those in need, however, was limited by the common perspective of that era. Because the United States offered a uniquely broad level of resources for self-employment at a subsistence level, there was no question of need for those capable of normal physical activity.⁵³

The Protestant ethic predominated.⁵⁴ Successful employment was tantamount to moral worth, while financial failure was a sign of moral weakness. Although by the middle of the nineteenth century the strongest of these moralistic views of economic success or failure were beginning to lose their grip, attitudes toward welfare assistance remained persistently moralistic.⁵⁵ Local welfare administrators identified morally worthy recipients.⁵⁶ Widows with infants were obviously deserving while able-bodied transients were not entitled to consideration.⁵⁷ Thus, a state obligation to provide public assistance was understood and accepted as a local responsibility bounded by narrow conceptions of the deserving poor.

Assumptions about who merits assistance and how it should be administered have changed dramatically in the last one hundred

49. In 1870, 53% of the United States work force was engaged in agricultural employment. UNITED STATES BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES COLONIAL TIMES TO 1975 at 134. In contrast, 2.8% of the United States labor force was engaged in agricultural employment in 1980. BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 54, 55 (1983).

50. See J. MADISON, *supra* note 1.

51. See 43 Eliz., ch. 2 (1601).

52. See Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CALIF. L. REV. 175 (1955).

53. Concern for the welfare of the general population still could be addressed through the philosophy articulated by Thomas Jefferson: "Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural rights." PAPERS OF THOMAS JEFFERSON 8:681-82, noted in R. MATTHEWS, *THE RADICAL POLITICS OF THOMAS JEFFERSON* 27-28 (1984).

54. See A. LaFrance, *Welfare Law: Structure and Entitlement in a Nutshell* 1-13 (1979).

55. See Woodard, *supra* note 48, at 310.

56. *Id.* See also *King v. Smith*, 392 U.S. 309 (1968).

57. See *New York v. Miln*, 36 U.S. 102 (1837). For identification of the transition in attitudes toward responsibility for care of transients, see *Edwards v. California*, 314 U.S. 160 (1941).

years. This transformation was dictated by the evolving structure of the economy described as a shift "from laissez faire to the welfare state."⁵⁸ Demographic changes meant that the majority of the population was no longer tied to an agrarian base where individual labor was the primary key to existence.⁵⁹ Instead, changes affecting employment often resulted from institutional changes that the individual worker could not control.⁶⁰ Calvin Woodard defined the welfare state as the logical derivative of the proposition "that poverty is an economic, not a moral phenomenon."⁶¹ One of the implications of this shift was that public welfare became recognized as a state and federal, rather than local, responsibility.⁶² Election of Franklin Roosevelt demonstrated an initial majority agreement that a federal response to the depression was necessary.⁶³ Subsequent support for building the "great society" signaled a continuing commitment to extend government support for basic minimum personal needs in time of prosperity as well as depression.

Changes in reality do not necessarily provoke changes in perspective. While the myth that virtue will assure employment persists, there is nevertheless a broadly based social and political recognition of the government's obligation to meet basic needs. The acceptance of a "safety net"⁶⁴ by the conservative majority of the 1980s demonstrates the endurance of the new principles of public support. In comparison with the debate that characterized previous generations, a *political* right to welfare protection can now be said to have achieved acceptance.⁶⁵

The bureaucratic structure used to administer welfare services, however, reflects a clear hierarchy in the level of political support

58. Woodard, *supra* note 48, at 323.

59. The percentage of the American work force employees in agriculture shifted from 52% in 1870 to 4.7% in 1970. See UNITED STATES BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 127 (Bicentennial ed. 1975).

60. Woodard, *supra* note 48, at 322-323.

61. *Id.* at 311.

62. *Id.* See also A. LAFRANCE, *supra* note 54, at 6-12. In *Edwards*, 314 U.S. at 174, the Supreme Court noted that "in an industrial society the task of providing assistance to the needy has ceased to be local in character."

63. See A. LAFRANCE, *supra* note 54, at 13.

64. During the early years of President Reagan's administration, a dispute arose concerning the definition of the "safety net" needed to assure minimum subsistence. Implicit in this debate was acceptance of the government's responsibility to meet these needs. See President Reagan's State of the Union Address, 128 CONG. REC. H51, at 53 (daily ed. Jan. 26, 1982).

65. See *id.*

and protection for different groups of potential welfare recipients. The group on top, with strongest support, includes both the aged and the disabled.⁶⁶ That group is protected by federal law and served by the federal Social Security Administration.⁶⁷ A second level of support is extended to dependent children in one parent families who are assured assistance by the federal government,⁶⁸ but who depend on the states to establish the level of their support and to administer the programs.⁶⁹ Closely related but just below this group are those whom the states may, at their option, choose to include in the federal assistance programs.⁷⁰ At the bottom of the heap, the group most likely to be treated with contempt by the legislatures (and who receive little if any federal support), are those in the "general assistance" category who are left over from the other groups and who are nevertheless in need of basic assistance.⁷¹ In Victorian terms, they are not "morally worthy."

The separate treatment of the groups described above can be justified.⁷² Children do have different needs and interests than the disabled. Furthermore, the interest in assuring that those capable of work will have the incentive to do so is legitimate. While distinctions between these groups may be rational or even reasonable, it is critically important to emphasize the differences in "acceptability" of the various groups, and the likelihood that those on the bottom of the hierarchy may be treated with indifference if not contempt.⁷³

The intended purpose in describing this historical and structural overview is to underscore that the social and economic changes that have occurred support an urgently needed reevaluation of applicable legal principles. The judiciary has generally lagged behind other government institutions in accepting the consequences of social and political change. This slow response could be explained in terms of the inherently conservative nature of the judicial branch.⁷⁴ In the con-

66. These groups are defined in the Social Security Act, 42 U.S.C. § 1382 (1985).

67. Supplemental Security Income, 42 U.S.C. §§ 1381-1395w.

68. Aid to Families with Dependent Children, 42 U.S.C. §§ 601-676. Note that the predecessor of this program restricted aid to "children of widows" since they were the "morally worthy" recipients. See *King v. Smith*, 392 U.S. 309, 320-21 (1968).

69. 42 U.S.C. § 602.

70. *Id.* § 607.

71. Cases from different jurisdictions illustrate the hostile treatment extended by the states to all or part of this group. See *Price v. Cohen*, 715 F.2d 87 (3d Cir. 1983); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973). See also *Jefferson v. Hackney*, 406 U.S. 535 (1972).

72. It is consistent with the principle of equality to increase awards for those who work harder or make better choices in life. The question Dworkin poses is: "what reasons for deviation are consistent with equal concern and respect?" See R. DWORKIN, *PRINCIPLE*, *supra* note 34, at 209.

73. See *supra* note 71 and accompanying text.

74. See A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT*

text of protection for the economic rights of the poor, however, additional reasons exist for slow judicial acceptance. Experience with substantive due process created a reluctance to interfere with government regulations.⁷⁵ Furthermore, there was judicial acceptance of the need for government flexibility in responding to economic problems.⁷⁶ As a result, a line was drawn between civil liberties that permitted judicial intervention and economic classifications that paid extreme deference to legislative decisions.⁷⁷ As the artificial nature of this line became more obvious, the judiciary slowly accepted responsibility for assuring fundamental fairness in the government's distribution of basic benefits.⁷⁸

SEARCH FOR LEGAL PRINCIPLES

Although scholars agree that there have been dramatic social, economic and political changes since the middle of the nineteenth century, few accept those changes as an independent basis for new constitutional standards.⁷⁹ Their reluctance can be described in terms of a distinction between "background rights" and "institutional rights."⁸⁰ As defined by Professor Dworkin, background rights "provide a justification for political decisions by society in the abstract."⁸¹ Thus, *rights* to food, housing, health care or education support *legislative* action in those contexts. But identification of such background rights in a political context does not establish legal,⁸² let alone constitutional, status for those claims.⁸³ The jurisprudential de-

THE BAR OF POLITICS (1962).

75. See *Lochner v. New York*, 198 U.S. 45 (1905).

76. See *Flemming v. Nestor*, 363 U.S. 603, 610 (1960) ("To engraft upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands.").

77. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 530-531 (3d ed. 1986) [hereinafter *CONSTITUTIONAL LAW*].

78. See *infra* notes 79-152 and accompanying text.

79. See, e.g., the opinion for the Court of Justice Powell in *San Antonio v. Rodriguez*, 411 U.S. 1, 31 (1973); see also R. DWORKIN, *RIGHTS*, *supra* note 34.

80. See R. DWORKIN, *RIGHTS*, *supra* note 34, at 93.

81. *Id.*

82. Two different principles of statutory construction are part of the background of related legal principles. The first, which directs that relief and social welfare statutes are to be "liberally construed," could be considered part of the background of related legal principles. See 81 C.J.S. *Social Security* § 5 (1977); see, e.g., *King v. Smith*, 392 U.S. 309 (1968) and the concurring opinion of Justice Douglas in that case, 392 U.S. at 334. Despite substantive parallels, however, this statutory principle cannot be tied directly to a constitutional standard.

83. For a more positive description of the role of background rights, see R. DWORKIN, *PRINCIPLE*, *supra* note 34, at 17. In that paragraph Dworkin discusses the

bate regarding welfare rights is appropriately directed to principles which have been developed by the courts.

Underlying concern for fair treatment of recipients of government aid has evolved slowly in interpretations of the open-textured due process and equal protection clauses of the fourteenth amendment.⁸⁴ That evolution, however, has been anything but clear or consistent. Dramatic declarations of rights for the poor have been countered by retreats appearing to negate such theories. These inconsistencies can be traced to strong disagreements within the Court and shifting patterns of majority support. While it would strain credibility to argue that a coherent pattern has emerged from this process, it nevertheless can be demonstrated that denial of fundamental public benefits triggers careful review of government action by several Justices of the Supreme Court. An overview of the case law documents those developments.

Supreme Court Opinions

The Supreme Court of the 1950s was the product of political concerns about judicial interference with the rights of both state and federal governments to legislate on behalf of the general welfare. Members had been chosen at least in part for their acceptance of the government's new role and function, especially that arising from the Social Security Act and other New Deal legislation.⁸⁵ An underlying assumption was that the legislature, as the progressive branch of government, should be free from interference by the conservative judiciary. This "progressive" background provided little encouragement for those seeking judicial review of claims for aid from a reluctant government.

In an early, hesitant opinion, the Supreme Court in *Griffin v. Illinois*⁸⁶ cited both the equal protection and due process clauses in requiring Illinois to provide transcripts of criminal trials to indigent defendants for appellate review.⁸⁷ In a five to four decision, the Court found that a state which grants appellate review cannot do so "in a way that discriminates against some convicted defendants on account of their poverty."⁸⁸ The majority in *Griffin* rejected the theory that the due process clause required state action on behalf of

effect of background rights as limits on inconsistent legal principles.

84. See J. ELY, *supra* note 12, at 14-32. Only the due process and equal protection clauses can be understood as having meaningful, substantive content despite Ely's preference for privileges and immunities.

85. Justices Black, Reed, Frankfurter, Douglas and Jackson all were appointed by Franklin Roosevelt with an understanding that they would support his government's social legislation.

86. 351 U.S. 12 (1956).

87. *Id.* at 18.

88. *Id.* at 18.

indigent defendants.⁸⁹ The Court's delicate treatment of the due process clause reflected special concern for substantive analysis, with all of its historical baggage.

Four years later the Court faced its first major challenge by individuals excluded from Social Security protection. In *Flemming v. Nestor*⁹⁰ a majority again demonstrated its fear of imposing substantive constraints on the legislature. In *Flemming*, Social Security benefits had been terminated for an alien deported because of Communist Party membership between 1933 and 1939. In denying relief under the due process clause of the fifth amendment, the Court held: "To engraft upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustments to everchanging conditions which it demands."⁹¹

Subsequent cases marked the thrusts and parries that accompanied the emerging case law. A hotly divided Court recognized procedural safeguards when wages⁹² or welfare benefits⁹³ were at stake. The Court struggled to find appropriate boundaries for such protection: some Justices advocated extending the new due process theory to every denial of government benefits,⁹⁴ while others wanted to abandon totally the effort to provide pre-termination constraints.⁹⁵ Justice Powell established a middle ground by accepting the idea of "flexible due process" which was satisfied by a post-termination hearing to review termination of old age, survivors and disability insurance provided by Social Security.⁹⁶

Developments in procedural due process marked judicial recognition of "new property" in a welfare state.⁹⁷ The Court's more sensitive treatment of basic benefits illustrated concern for the "brutal needs"⁹⁸ of the recipients. The government faced a heavy burden in

89. *Id.* at 21. Justice Frankfurter concurred with the majority but refused to accept a rationale based on due process.

90. 363 U.S. 603 (1960). In interpreting the fifth amendment the Court noted that "the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Id.* at 611.

91. *Id.* at 610.

92. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

93. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

94. *Arnett v. Kennedy*, 416 U.S. 134, 206 (1979) (Marshall, J., dissenting).

95. See *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972) (White, J., dissenting). Also, note the fears of Justice Stewart in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 629 (1974) (Stewart, J., dissenting).

96. *Matthews v. Eldridge*, 424 U.S. 323 (1976).

97. See Reich, *supra* note 42.

98. *Goldberg*, 397 U.S. at 261.

justifying its inability to provide a pre-termination hearing in that context.⁹⁹ Procedural constraint in the context of brutal needs was thus elevated to a principle with constitutional status.

By contrast, equal protection analysis (as well as substantive analysis of due process) has failed to generate comparable agreement on a majority position. An early thrust came from Justice Brennan in *Shapiro v. Thompson*.¹⁰⁰ In that case, year-long residency requirements were linked to receipt of Aid to Families with Dependent Children (AFDC). In carving out a right to travel, the Court invalidated the welfare eligibility restrictions.¹⁰¹

The parry came in two cases within the next three years. *Dandridge v. Williams*¹⁰² upheld maximum AFDC limits for large families, and *Jefferson v. Hackney*¹⁰³ allowed Texas to restrict AFDC shelter allowances more than it restricted allowances for the aged or disabled. It was during this period of frequent judicial review of "Great Society" welfare regulations that scholars actively formulated theoretical arguments for case law that would protect against economic discrimination.¹⁰⁴ Arguments were generally tied to a traditional notion of equal protection requiring strict judicial scrutiny in the context of "suspect categories." With assistance from Justices Marshall¹⁰⁵ and Douglas,¹⁰⁶ the theory emerged as a claim that poverty was a suspect class.¹⁰⁷

The cases holding poverty suspect gave general credence to the theory that equal protection demanded a right to minimum basic benefits.¹⁰⁸ But efforts to develop an extended theory tying poverty to a wide range of fundamental benefits appeared to collapse with sub-

99. *Id.*

100. 394 U.S. 618 (1969).

101. *Id.* at 629, 642.

102. 397 U.S. 471 (1970).

103. 406 U.S. 535 (1972).

104. In addition to the articles by Michelman, *supra* notes 12, 14 and 15, and the book by Rawls, *supra* note 15, see, e.g., Redlich, *Unconstitutional Conditions on Welfare Eligibility*, 1970 WIS. L. REV. 450; Reinstein, *The Welfare Cases: Fundamental Rights, the Poor, and the Burden of Proof in Constitutional Litigation*, 44 TEMP. L.Q. 1 (1970); LaFrance, *Federal Litigation for the Poor*, 1972 L. & SOC. ORDER 1; Graham, *Poverty and Substantive Due Process*, 12 ARIZ. L. REV. 2 (1970); Horowitz, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State*, 15 UCLA L. REV. 787 (1968); Comment, *Equal Protection as a Measure of Competing Interests in Welfare Litigation*, 21 ME. L. REV. 175 (1969); Comment, *Discrimination against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435 (1967); Comment, *Evolution of Equal Protection — Education, Municipal Services and Wealth*, 7 HARV. C.R.-C.L. L. REV. 105 (1972).

105. *James v. Valtierra*, 402 U.S. 137, 143 (1971) (Marshall, J., dissenting).

106. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

107. *Id.* at 668.

108. See Michelman, *Supreme Court*, *supra* note 12. Thus, just as the burden of having to pay for a transcript in order to appeal a conviction discriminated against the poor, arguments were made that denial of other minimum goods and services also was discriminatory.

sequent Supreme Court decisions. A death knell was heard by some to sound in *San Antonio v. Rodriguez*.¹⁰⁹ In that case, the Court upheld a school financing scheme which offered more state aid per pupil to some wealthy school districts than other poorer districts. The decision effectively barred realistic *equal* opportunities for the poor and appeared to have created a twentieth century counterpart to *Plessy v. Ferguson*.¹¹⁰ Coupled with *Dandridge*, *Jefferson* and subsequent cases like *James v. Valtierra*,¹¹¹ the Court put to rest claims that poverty was a suspect class. Only in limited situations where other rights with an arguable constitutional basis such as voting,¹¹² travel,¹¹³ criminal procedure,¹¹⁴ marriage¹¹⁵ or divorce¹¹⁶ were involved was there majority support within the Court for such a theory.¹¹⁷

It should be noted that the primary cases ostensibly opposed to a welfare rights thesis failed to reach the central element of the theory that would limit that right to a *minimum* level of benefits.¹¹⁸ In *Dandridge*, the Court faced a challenge to *maximum* benefits for large families,¹¹⁹ and in *Rodriguez*, the Court explicitly noted: "Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise [of the right to speech or vote], . . . we have no indication that the present levels of educational expenditures in Texas provide an education that

109. 411 U.S. 1 (1973).

110. 163 U.S. 537 (1896). The analogy between *Plessy v. Ferguson* and *San Antonio v. Rodriguez* is buttressed by the high percentage of minorities who are poor. Thus, the poorer school district at issue in *Rodriguez* was 90% Mexican-American and 6% black; the wealthy district was over 80% white. 411 U.S. at 12-13. The Court's decision to ignore this reality sounds similar to the earlier pretense that separate could be equal. For further discussion of the modern link between poverty and race, see W. WILSON, *THE DECLINING SIGNIFICANCE OF RACE* (1978).

111. 402 U.S. 137 (1971).

112. *Harper v. Virginia*, 383 U.S. 663 (1966).

113. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

114. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Anders v. California*, 386 U.S. 738 (1967).

115. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

116. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

117. Thus, by 1974, when indigents were forced to wait one year for free nonemergency use of the county hospital, only Justice Douglas would have decided the case using a "poverty is suspect" rationale. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 270 (1974). Only Justice Rehnquist dissented, however, from a decision that the restriction violated the "right to travel," and Justice Marshall's opinion for the Court stressed the significance of "basic necessities" to that analysis. *Id.* at 259.

118. See Michelman, *Welfare Rights*, *supra* note 12.

119. *Dandridge v. Williams*, 397 U.S. at 471.

falls short.”¹²⁰ The qualified nature of this statement supports the general feeling that advocates of a right to welfare and the Supreme Court are not moving along a common track.

The period after 1970 has been marked by repeated efforts to identify an acceptable constitutional theory consistent with the decisions of the Supreme Court. Commentators have attempted to mold equal protection doctrine around the subject matter of cases that triggered intensified scrutiny by the Court.¹²¹ Originally, there were two tiers of scrutiny. Discrimination based on race or alien status required strict scrutiny;¹²² all other legislative classifications were permissible if merely rational.¹²³ As the Court began to grapple with sex discrimination, an intermediate level of review emerged.¹²⁴ This intermediate level of review represented a compromise between those who would treat sex similar to race, as a suspect classification, and those who rejected such a dramatic judicial move.¹²⁵ Other subjects also led to similar compromise — the Court has gone back and forth in its review of legitimacy¹²⁶ and alien status classifications.¹²⁷ A

120. *Rodriguez*, 411 U.S. at 36-37.

121. See CONSTITUTIONAL LAW, *supra* note 77, at 590-600.

122. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

123. Even in earlier years there was some confusion about the definition of this “rational basis” test. The most deferential review, common in recent decades, was first described in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911). See, e.g., the statement from *Flemming v. Nestor*, 363 U.S. 603, 610 (1960). Between 1920 and 1934, however, the Court applied a milder test requiring that the classification bear a “fair and substantial relation” to the object of the law. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). See J. CHOPER, Y. KAMISAR & L. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS*, 1980-81, at 3-4 (1982) [hereinafter *TRENDS AND DEVELOPMENTS*]. Recently the Court has moved back and forth between these formulations. Compare the opinion by Justice Rehnquist in *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174 (1980) (citing *Lindsley*) with the opinion by Justice Brennan in *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citing *F.S. Royster Guano Co.*).

124. Initially, the Court articulated a traditional rational basis test in reviewing sex discrimination. *Reed v. Reed*, 404 U.S. 71 (1971). “Suspect” terminology was used a year and a half later in the plurality opinion of *Frontiero v. Richardson*, 411 U.S. 677 (1973). Since that time, the Court has given more sensitive review to sexual classifications than to traditional categories that fall short of “strict scrutiny.” Although it has been difficult to identify a consistent formulation of the test to be applied, at least four members of the Court agree with the statement in *Craig v. Boren*, 429 U.S. 190 (1976), that sexual classifications must be “substantially related to achievement of [important governmental objectives].” *Id.* at 197. See *TRENDS AND DEVELOPMENTS*, *supra* note 123, at 19-40.

125. See *TRENDS AND DEVELOPMENTS*, *supra* note 123.

126. The Court appeared to go back and forth in upholding legitimacy classifications in *Labine v. Vincent*, 401 U.S. 532 (1971), and then striking down discrimination against illegitimates in *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972). The most recent decisions have used “rational basis” language while searching for a “substantial relationship to legitimate state interest.” See, e.g., *Pickett v. Brown*, 462 U.S. 1 (1983).

127. Alienage traditionally has been identified as suspect. See *Graham v. Richardson*, 403 U.S. 365 (1971). Recently, however, the Court has carved out a “public service” exception permitting discrimination against aliens as teachers or as policemen. See, e.g., *Ambach v. Norwick*, 441 U.S. 68 (1969) (teachers); *Cabell v. Chavez-Sulide*, 454

similar ambivalence appears in Court descriptions of the status of fundamental interest classifications. While classifications impairing the right to travel¹²⁸ or vote¹²⁹ are found to warrant special judicial protection, the Court has used language of "rationality"¹³⁰ to justify its decisions. Those Justices who advocated explicit use of multi-tiered or sliding scale analysis¹³¹ have been frustrated by the majority which clings to the fiction that classifications are either suspect — demanding compelling justifications — or not suspect, subject to acceptance provided they are rational (with frequent shifts in the meaning of "rational").¹³²

The Court's refusal to identify consistently the principles that guide its analysis has resulted in a particularly confused state of legal theory. Most commentators agree that classifications based on sex, legitimacy, alien status, or impinging upon voting, privacy, and travel all generate arguments of principle that influence the Court's equal protection analysis.¹³³ Those commentators, however, generally have rejected claims that basic welfare benefits also trigger heightened judicial scrutiny.¹³⁴

Several cases are particularly troublesome to those who insist that basic government benefits do not warrant special constitutional protection. A triad of 1973 decisions have been especially worthy of comment.¹³⁵ In *United States Department of Agriculture v. Moreno*,¹³⁶ the Court used a rational relationship test to strike down a food stamp exclusion of those in households with unrelated individuals. In *United States Department of Agriculture v. Murry*,¹³⁷ the Court held that a food stamp program that excluded households containing the tax dependent of another person created an impermissi-

U.S. 432 (1981) (policemen).

128. See *Shapiro v. Thomson*, 394 U.S. 618 (1969).

129. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972).

130. See, e.g., *Zobel v. Williams*, 457 U.S. 55 (1982) (no "rational state interest" served by distinction between citizens who established residence before or after 1959); *Mahon v. Howell*, 410 U.S. 315 (1973) (16.4% deviations in apportionment served a "rational" state interest).

131. The most frequent advocate of flexible equal protection standards has been Justice Marshall. See *Dandridge*, 397 U.S. at 519-21 (Marshall, J., dissenting). Justice Powell also has leaned toward a more flexible approach as described in *Schweiker v. Wilson*, 450 U.S. 221, 239-40 (1981) (Powell, J., dissenting).

132. See *supra* note 126.

133. CONSTITUTIONAL LAW, *supra* note 77, at 682-816.

134. *Id.* at 680.

135. See Michelman, *Welfare Rights*, *supra* note 12, at 686.

136. 413 U.S. 528 (1974).

137. 413 U.S. 508 (1973).

ble "irrebuttable presumption"¹³⁸ that failed to meet constitutional requirements of substantive due process. And in *New Jersey Welfare Rights Organization v. Cahill*,¹³⁹ the Court struck down a state statutory denial of welfare benefits to families with illegitimate children.

Many commentators have been reluctant to deal with the *Murry*, *Moreno* and *Cahill* cases. The opinions are described as aberrations and mistakes¹⁴⁰ while some believe that at least *Murry* was overruled by the Court's subsequent decision in *Weinberger v. Salfi*.¹⁴¹ The cases remain flies in the ointment to theorists who agree that poverty is not suspect and insist that welfare regulation is subject to the superficial review of mere rationality standards.

Frank Michelman argues that the cases should be read as demonstrations of the *right* to "needed means of subsistence."¹⁴² The case that would appear to place a capstone on Michelman's argument is *Plyler v. Doe*.¹⁴³ In that case the Court ruled that Texas could not deny an elementary school education to aliens. The Court's holding appeared inconsistent with traditional equal protection analysis rejecting special concern for education, and which would not have warranted protection for *illegal* aliens.¹⁴⁴ In reaching its conclusion, however, the Court frankly acknowledged the substantive importance of assuring minimum educational benefits: "We cannot ignore the significant social costs borne by our nation when select groups are denied the means to absorb the values and skills upon which our social order rests."¹⁴⁵ Given the implications of a complete denial of education rights to a "discrete class of children not accountable for their disabling status,"¹⁴⁶ the Court held that the state restriction could "hardly be considered rational unless it furthers some substantial goal of the state."¹⁴⁷

Use of the term "rational" persisted in *Lyng v. Castillo*¹⁴⁸ where the Court upheld treatment of close family relatives who lived together as a household unit (therefore reducing their total food stamp eligibility) regardless of whether they cooked and ate as a group. The Court distinguished *Moreno* by stressing the irrational nature of

138. *Id.* at 514.

139. 411 U.S. 619 (1973).

140. CONSTITUTIONAL LAW, *supra* note 77, at 683. The authors conclude: "these two decisions [United States Dep't of Agric. v. *Moreno* and United States Dep't of Agric. v. *Murry*] stand out as atypical findings that a law fails to meet the rationality test."

141. 422 U.S. 749 (1975).

142. See Michelman, *Welfare Rights*, *supra* note 12, at 691.

143. 457 U.S. 202 (1982).

144. *Id.* at 223.

145. *Id.* at 221.

146. *Id.* at 223.

147. *Id.* at 224.

148. 106 S. Ct. 2727 (1986).

the classification in that case.¹⁴⁹ Two other factors specifically noted by the Court, however, breathe life into an appeal for judicial protection. First, Justice Stevens acknowledged that the classification in *Lyng* only resulted in a proportionate reduction in benefits rather than the ineligibility for benefits which was at issue in *Moreno*.¹⁵⁰ Consistent judicial concern for minimum benefits therefore survives. Second, in this case, Congress was dealing with a traditional nuclear family that had not been afforded the same treatment as unrelated individuals residing together, just the reverse of *Moreno*. Because the traditional family is generally accorded political respect, judicial protection is less important.¹⁵¹ The Court's review of these factors in *Lyng*, plus the obvious concerns for administrative resources and prevention of fraud which had motivated Congress in that case, is consistent with arguments that denial of basic benefits should trigger more careful review. The language in all of these cases, however, falls short of establishing a right to receive minimum state benefits adequate to meet demands for subsistence.¹⁵²

The Appeal to "Neutral Principles"

The central problem with extending constitutional protection to victims of unfair welfare distribution schemes is the concern that judges should not substitute their personal policy preferences for those of the legislature. The "realistic" argument that such a judicial role was appropriate (and perhaps even inevitable) was rejected by the legal positivists who focused on the legitimacy of legislative acts. By insisting upon adherence to the language of properly enacted law, positivists focused attention on the value of due process. This appeal to the democratic process was part of a broader effort to identify

149. *Id.* at 2730.

150. *Id.* at 2730 n.3.

151. *Id.* at 2729.

152. Several members of the Court went out of their way to stress those limits in *Plyler*. Justice Brennan stated: "Public education is not a 'right' granted to individuals by the Constitution." 457 U.S. at 221. Justice Blackmun stated: "it is undeniable that education is not a 'fundamental right' in the sense that it is constitutionally guaranteed." *Id.* at 235. Justice Powell stated: "I emphasize the Court's conclusion that strict scrutiny . . . has been reserved for instances in which a 'fundamental' constitutional right or a 'suspect' classification is present. Neither is present in [this case]." *Id.* at 238 n.2. But note that all four of the justices writing opinions with the majority (Brennan, Marshall, Blackmun and Powell) recognize special status in the context of the complete loss of an elementary education. Justice Blackmun notes that "classifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions." *Id.* at 234.

neutral principles as guides for the judiciary.¹⁵³ John Hart Ely, for instance, would inject procedural values¹⁵⁴ into the open-textured clauses of the fourteenth amendment. He claims that such values have a stronger constitutional basis and a superior claim to neutrality than a more open-ended appeal to principles.¹⁵⁵ Ely, however, also recognizes that some substantive values may be implicated by the principle of democracy and may therefore be incorporated through the same door. While the values he identified relate to speech, publication and political association,¹⁵⁶ there is no inherent reason why the line should be drawn at that point and not extended to education, health or minimum welfare assistance. If the goal is equal participation in the political process, surely minimum health and welfare are essential factors in meeting that goal.

Ely also recognizes the need to safeguard minorities while otherwise deferring to majoritarian principles,¹⁵⁷ but he does not offer convincing "neutral" guides to determine which minorities warrant protection. In other words, the neutrality Ely advocates only works when certain assumptions are shared.¹⁵⁸ voting and free speech are essential to full participation in the democratic process while education, health and minimum resources are not.¹⁵⁹ Racism is vile; discrimination against the poor is not.

Gerald Gunther offered an alternative "neutral" approach to equal protection analysis which was also intended to counter haphazard substitution of judge-made policy preferences with his description of "intensified means scrutiny."¹⁶⁰ Gunther's theory was that the Court had added teeth to a traditional concept of mere rationality. It did so without challenging the aims or goals of the legislation or referring to the particular persons affected. Instead, it focused on the means employed by the legislative classification to meet the legislative purposes.¹⁶¹ The appeal of Gunther's theory was that it avoided problems of judicial review of the substance of legislative decisions. A comparison of means with purposes could be made in all

153. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

154. J. ELY, *supra* note 12, at 11-41.

155. *Id.* at 73-104.

156. *Id.* at 105.

157. *Id.* at 135-79.

158. See Brest, *supra* note 32. Dworkin makes an additional attack on the line Ely draws between process and substance in R. DWORKIN, *PRINCIPLE*, *supra* note 34, at 58-69.

159. In his text, Ely does not address the question of whether minimum standards of health or welfare are a prerequisite to participation in the political process. J. ELY, *supra* note 12.

160. Gunther, *The Supreme Court 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

161. *Id.* at 20-24.

cases regardless of the subject matter of the legislation, therefore downplaying claims that the judiciary was substituting its substantive values for those of the legislature.¹⁶² If Gunther's theory had proven accurate, it would not have been logical to argue for a separate legal principle requiring fair distribution of basic welfare benefits. But the Supreme Court has not jumped onto Gunther's bandwagon. Equal protection opinions of the Court continue to vary both in style and substance, at times engaging in substantial review and at other times returning to "mere rationality" language.¹⁶³ These variations belie arguments for neutral principles.

Gunther anticipated this inconsistency when he acknowledged use of an intensified rational basis review to avoid more troublesome constitutional issues.¹⁶⁴ Thus, when debts of indigent criminal defendants were singled out for discrimination, the Court failed to find "some rationality" and thereby avoided having to face the deeper implications of *Gideon v. Wainwright*.¹⁶⁵ The Court again used an intensified rational basis test to avoid dealing with the constitutional parameters of detention for the mentally ill.¹⁶⁶ The fact that a rational basis test is given bite when fundamental interests lurk behind, but is not given the same strength in all other contexts, suggests a substantive aspect of the constitutional scrutiny that goes beyond evaluation of legislative means. Although Gunther's theory continues to receive support,¹⁶⁷ the products of judicial review remain inconsistent with any purely "neutral" analysis.

The Myth of "Rights"

On the other end of the spectrum from neutral procedural values is the claim that principles guiding constitutional analysis should reflect "rights in the strong sense."¹⁶⁸ Recognition of "rights" has the same underlying appeal as the call for "neutral" process-oriented values. Both ostensibly offer bright lines to guide the judiciary that are above the fray of personal policy preferences.

Application of rights terminology to create review of welfare clas-

162. *Id.* at 21.

163. *See supra* note 128.

164. Gunther, *supra* note 160, at 26-29.

165. 372 U.S. 335 (1963). *See also* Gunther, *supra* note 160, at 26, for his discussion of *James v. Strange*, 407 U.S. 128 (1972).

166. *Jackson v. Indiana*, 406 U.S. 715 (1972). *See* Gunther, *supra* note 160, at 27.

167. *See* Leedes, *The Rationality Requirement of the Equal Protection Clause*, 42 OHIO ST. L.J. 639 (1981).

168. *See* R. DWORKIN, *RIGHTS*, *supra* note 34, at 190.

sifications creates conflicts which stem in part from the language of rights. The term itself is symbolic of the liberal dreams and frustrations so prevalent in the 1960s and 70s. The "politics of rights"¹⁶⁹ were destined to conflict with the purity of acceptable judicial theory. The judiciary is anxious to preserve the "virtue of reality"¹⁷⁰ and therefore avoid a declaration of rights that will not be realized. Gaps in this nation's commitment to minimum welfare are too great to support judicial declaration of a right so shrouded by myth.¹⁷¹

The language of rights has lost some of its luster for liberals as well as for conservatives.¹⁷² The civil rights movement of the 1960s failed to establish the great society. Expectations raised by the concept of rights were frustrated by the reality of limited success and frequent failure.

Part of the lesson was that rights conflict. The bright lines drawn around rights did not solve the problem of having the judiciary balance competing claims against each other. Discrimination could be rooted out only through new forms of discrimination.¹⁷³ Privacy could only be assured through limitations on other freedoms.¹⁷⁴ Assumptions of public responsibility often conflict with personal liberty.¹⁷⁵ And the harshness of the conservative crusade rests on the nagging reality that resources are limited and bureaucratic solutions leave much to be desired. An appeal to *rights* to receive benefits in the context of this bureaucratic maze, especially in an era of mandated government budget cuts, will fall on deaf ears in the Supreme Court.

Despite perceived shortcomings in an appeal to rights, there continues to be support for a legal *principle* that welfare benefits should be distributed fairly. Procedural protection for brutal needs remains vital.¹⁷⁶ Similar substantive principles can be derived from the equal

169. See S. SHEINGOLD, *THE POLITICS OF RIGHTS* (1974).

170. *Id.* at 46-49.

171. See *id.* for a discussion of the importance of preserving the "myth of rights."

172. See Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986) (analysis of the conservative influence of "liberal" welfare rights based on a conception of the "new property").

173. See, e.g., the conflict between affirmative action and "seniority rights" in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

174. The privacy of welfare records, for instance, necessitates limits on public access to government records.

175. See, e.g., *Wyman v. James*, 400 U.S. 309 (1971); *King v. Smith*, 392 U.S. 309 (1968). Public welfare assistance for children generally has been accompanied by state involvement in parental decisions.

176. See *supra* notes 92-99 and accompanying text. This is true despite the fact that in the general pretrial context where private property is at issue the Court appears to have developed a formula which does not vary with the type of property involved (assuming that the party seizing the property can claim an apparent right to possession). See e.g., *North Georgia Finishing Co. v. Di-Chem*, 419 U.S. 601 (1975).

protection/substantive due process opinions of the Court.¹⁷⁷ Failures in the distributional structure of this country, and existing holes in the welfare safety net,¹⁷⁸ however, cannot be corrected by the constitutional principles recognized by the Court.

In an ideal new constitutional convention that demands equal concern for all segments of society, a right to minimum protection against economic hazard might be given a more fundamental constitutional role.¹⁷⁹ Our historical roots in the struggle for representation and economic freedom, however, give prominence to those "democratic" values rather than to the social welfare values that have emerged in many Western European nations.¹⁸⁰ Because of this difference in emphasis, neither judges nor scholars are likely to conclude that there is a fundamental right to receive welfare benefits in this country. There is a gap between rights associated with the ideal theory of John Rawls¹⁸¹ and the constraints (both real and imagined) faced by the current Supreme Court. As a result, "principled" recognition of "protection for recipients" is more likely to gain credence if separated from traditional rights terminology.

Intermediate Principles

An alternative approach begins with the premise that not all principles affecting constitutional decision-making reflect "rights in the strong sense."¹⁸² Although some constitutional rights, such as the

177. See *supra* note 12. Both Michelman and Tribe have advanced this argument.

178. See *supra* note 64. Gaping holes are especially apparent in comparing state provisions for monetary assistance, medical aid and shelter to two-parent families and able-bodied but unemployable adults in many states.

179. See J. RAWLS, *supra* note 15.

180. See R. DWORKIN, *PRINCIPLE*, *supra* note 34, at 26. Note also the contrast between the Court's ostensible "mere rationality" review of welfare classifications and the United Nations Covenant on Economic, Social and Cultural Rights, U.N. G.A. Res. 220 (Dec. 16, 1966), reprinted in E. OSMANCIZYK, *THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS* 359-61 (1985), which provides in Article 9 for a "right of everyone to Social Security," and in Article 11 for a right to "adequate food, clothing and housing."

181. See Michelman, *Pursuit*, *supra* note 15, at 997-1003. Michelman expressly deals with this issue in his discussions of "nonideal theory." He subsequently examines questions of "moral theory as a backdrop for positive entitlements," *id.* at 1010-15, and in that context defines a role for the moral theory of Rawls similar to that described in this article: "Perhaps a theory like Rawls' can impart meaning and direction to judicial events occurring in the wake of constitutional or legislative initiatives that arise, so far as the theory is concerned, quite spontaneously." *Id.* at 1010. My concern, however, stems from his description of a proposed "judicial activism" which exceeds obvious predilection of the Court, and with a theory which at one point he describes as "justice-inspired welfare rights . . . guaranteed to everyone regardless of need." *Id.* at 1012.

182. R. DWORKIN, *RIGHTS*, *supra* note 34, at 190.

right to free speech, cannot be abrogated by a simple balance of individual versus societal interests, those rights in the strong sense do not exhaust the range of possibilities. They represent the easy cases. The hard work begins with an identification of intermediate principles — principles that can be outweighed by something less than a compelling state interest, but are nevertheless entitled to consideration in the constitutional context.

Some may argue that intermediate principles have no place in constitutional analysis.¹⁸³ Fourteenth amendment analysis, for instance, could be limited to strong rights by narrowing its scope to: 1) fundamental interests (those mentioned in the first eight amendments, voting, travel, and privacy); 2) protection of discrete and insular minorities; and 3) freedom from arbitrary discrimination. All of these principles could be expressed in forceful terms and the purity of strong constitutional rights could be protected.

That “purity,” however, is as deceptive as it is superficially attractive. Thus, the starkness of the traditional two-tiered strict scrutiny/minimal review standard stands in particularly ironic contrast to the concept of equal protection. Few classifications are more arbitrary than those adopted by the Supreme Court itself in finding that the right to travel is fundamental,¹⁸⁴ while denial of subsistence can be justified by mere rationality.¹⁸⁵ In reality, even the Justices acknowledge that they make substantive distinctions that contradict their simplistic two-tiered approach.¹⁸⁶ Arguable suspect categories other than race, as well as fundamental interests such as voting, travel or privacy (and now education?), have been recognized on the basis of intermediate principles rather than as rights in the strong sense.¹⁸⁷

The need to weigh the principles involved is demonstrated by the Court’s treatment of other equal protection problems. Judicial scrutiny of reapportionment decisions demonstrates this need. The Court has held that congressional districts buttressed by article II as well as equal protection concerns must be divided within a state to near mathematical precision,¹⁸⁸ while state legislative districts are granted

183. Dworkin comes close to arguing that all constitutional rights must be rights in the strong sense: “[I]n the United States citizens are supposed to have certain fundamental rights against their Government, certain moral rights made into legal rights by the Constitution. If this idea is significant, and worth bringing about, then these rights must be rights in the strong sense.” *Id.* at 190. He subsequently acknowledges, however, that not all constitutional analysis has this character. *Id.* at 191.

184. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

185. See *Lavine v. Milne*, 424 U.S. 577 (1976). Note again that denial of basic necessities intensifies the right to travel analysis.

186. See CONSTITUTIONAL LAW, *supra* note 77, at 532, 533.

187. See *supra* notes 128-32 and accompanying text.

188. *White v. Weiser*, 412 U.S. 783 (1973) (striking reapportionment where maximum deviation from the ideal was 2.43%).

far greater latitude.¹⁸⁹ In other words, the principle of one person — one vote has relatively less weight in the state context: it has been understood as an intermediate principle, not as a right in the strong sense.

In a more current context, it is not necessary to treat discrimination based on race in the same fashion when a majority has enacted affirmative action laws as it was treated when the hostility of the majority was represented by the "separate but equal" doctrine.¹⁹⁰ Legislative efforts to remedy past discrimination therefore should not be subject to the same constraints as those applied to policies and practices of racism.¹⁹¹

At the same time, it may be more important for the Court to be sensitive to discrimination against the poor if it can be shown that the current political majority is insensitive toward their concerns. This need for judicial protection is heightened if it also can be shown that hostility towards the poor substitutes for overt racial discrimination of the past. Are current leaders, who refuse to recognize discrimination against sectors within the poverty community (while fully conscious of the disproportionate racial impact that results), any better than those leaders who institutionalized racism after the Civil War by accepting "separate but equal" standards?¹⁹²

The opinions of the Court in *Plyler* came as close as any to acknowledging acceptance of intermediate principles in equal protection analysis. Justice Marshall repeated his plea for "rejecting a rigidified approach to equal protection analysis, and of employing an approach that allows for varying levels of scrutiny depending upon 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness upon which the particular

189. *Mahon v. Howell*, 410 U.S. 315 (1973) (upholding deviations of up to 16.4%). See also *Davis v. Bandemer*, 106 S. Ct. 2797 (1986).

190. It should be readily acknowledged that "separate but equal" was a fiction created by the courts. See *Plessy v. Ferguson*, 163 U.S. 537 (1896). The fundamental problem that makes it so difficult for courts to safeguard minorities who are the object of the hostility of an existing majority is that judicial officers are likely either to share the hostility, or at least to be reluctant to act in a manner that is contrary to conventional morality. For arguments on both sides of this issue compare the opinions of Justices White and Blackmun in *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986).

191. The Supreme Court is divided on this issue as demonstrated by the opinions in *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986).

192. See, e.g., analysis of the factual background in *Rodriguez*, 411 U.S. 959; *Jefferson v. Hackney*, 406 U.S. at 551 (Douglas, J., dissenting). Just as in *Plessy*, inevitably the implication of those decisions is inferior treatment for a large segment of the minority community.

classification is drawn.’”¹⁹³ As Justice Brennan wrote for the Court in *Plyler*:

We have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest in the state.¹⁹⁴

Justice Powell compared review of legitimacy classifications and noted: “In these unique circumstances, the Court properly may require that the State’s interests be substantial and that the means bear a ‘fair and substantial relation’ to these interests.”¹⁹⁵ Justice Blackmun concurred, stating “[o]nly a pedant would insist that there are *no* meaningful distinctions among the multitude of social and political interests regulated by the States.”¹⁹⁶

The Justices’ frustration in finding “meaningful distinctions” stems in part from problems in articulating principles other than the classic fundamental interests.¹⁹⁷ In making this argument, it is important to distinguish between “strong rights” and “enduring principles.” The Court and commentators have expressed concern that principles which influence constitutional decision making should not be fleeting or merely reflect temporary concerns of the public.¹⁹⁸ Widespread agreement that such a principle is deeply rooted does not raise it to the status of a strong right — thereby precluding acceptance of a theory of intermediate principles. An important and enduring principle nevertheless can be one that is entitled to less than full deference and that can be countered by substantial rather than compelling state interests.

Once the role of intermediate principles in equal protection analysis is accepted, it is possible to consider protection from denial of fundamental goods and services as such a principle. As an intermediate principle it is entitled to substantial weight, but is not a trump in the strong sense of more traditional individual constitutional

193. *Plyler*, 457 U.S. at 231 (Marshall, J., concurring).

194. *Id.* at 217-18.

195. *Id.* at 239 (Powell, J., concurring).

196. *Id.* at 233 (Blackmun, J., concurring) (emphasis added).

197. Note that in *Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985), Justice Marshall, joined by Justices Brennan and Blackmun, stressed the need to articulate “the facts and principles that justify subjecting this zoning ordinance to . . . heightened scrutiny.” 105 S. Ct. at 3263.

198. In *Plyler*, Justice Brennan cites *Regents of the Univ. of Cal. v. Bakke*, 430 U.S. 265 (1978): “In expounding the Constitution, the Court’s role is to discern ‘principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.’” 457 U.S. at 218 n.16 (quoting A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 114 (1976)).

rights.¹⁹⁹ One would not have to argue that a compelling state interest was required to justify failure to provide equal treatment for all applicants for assistance. Legislative policy interests — arguments that societal interests should be balanced in the equation — would be appropriate (though not decisive). *Substantial* social policy arguments could outweigh the principle of equality in the distribution of benefits. By definition there would be more deference paid to legislative policy choices than found in the traditional context of more heavily weighted constitutional rights.²⁰⁰ Such decisions are hard precisely because they necessitate difficult assessments. The fact that the analysis is difficult, forcing both the Court and Congress to use scalpels when an axe is easier, is an inadequate justification for abdicating responsibility.

FAIR DISTRIBUTION AND BRUTAL NEEDS

Two themes can be identified from the opinions of the Supreme Court that overturned legislative classifications even though no suspect categories or fundamental interests were involved. One is an emphasis on the need for fairness,²⁰¹ and the second is the special concern in the context of brutal needs.²⁰² This emphasis is consistent with the concern for moral values described at the outset of this pa-

199. This intermediate principle may warrant substantially greater weight in the interpretation of state constitutional law than it is given in an analysis of the federal constitution. In most instances the principle of equality is built into the state constitutions in much the same way that it appears in the federal constitution. Often, however, it is accompanied by substantive state constitutional obligations to provide for the basic education, health or general well-being of the population. Even in the absence of such formal constitutional constraint, most states have a deeply rooted historical obligation to meet the needs of the poor. A legal principle that demands fundamental fairness in efforts to meet brutal needs may as a result be described as a right in the strong sense when analyzed as a part of the state constitutional law.

200. See generally J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 129 (1980). There are a number of reasons why this intermediate approach is appropriate in the public benefits context. As identified in this Article, one problem is the constraint of precedent and the attitude that currently limits the Court. Lack of explicit constitutional reference and limitations in the historical treatment of such claims are appropriate factors to be considered in weighing these principles. Furthermore, unlike rights to free speech or the free exercise of religion, welfare rights require resource transfers that interact in a complex fashion with regulation of the national economy. Legislative flexibility is important in that context and the legislature must therefore be given freer reign. Related to these constraints are realistic limits on the Court's remedial powers, particularly where a strong right to social insurance would require major change through legislative action.

201. See *supra* note 47.

202. *Id.*

per.²⁰³ Immanuel Kant, John Rawls and Frank Michelman all would recognize its origins.²⁰⁴

The principle I have described, however, is not based on an assumed right to primary social goods for the least advantaged.²⁰⁵ A Supreme Court interpretation in those terms might be vulnerable to the historical criticism of Justice Holmes for having embodied “a particular economic theory”²⁰⁶ in the Constitution. The intermediate principle that stresses fair distribution rests on a different basis that can be reconciled more easily with Justice Holmes’ dissent in *Lochner v. New York*.²⁰⁷ The key difference is that the emphasis on fairness rests on an assumption that the legislature already has made the decision to distribute the goods or services in question. The Court has never ordered the distribution of benefits not already the subject of a broad legislative mandate. When the Court overturned classifications bearing on the distribution of food stamps²⁰⁸ or general assistance²⁰⁹ or an elementary school education,²¹⁰ its orders were consistent with the underlying purpose of existing legislative programs.²¹¹ Thus, a Supreme Court majority apparently agrees that education is not a fundamental right.²¹² Nevertheless, once a state has “undertaken to provide an education to most children within its borders . . . the State must offer something more than a rational basis for its classification.”²¹³

203. See *supra* notes 15-18 and accompanying text.

204. See *supra* notes 15-16.

205. *Id.*

206. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting). There are historical roots for development of a need-based conception of rights. See Simon, *supra* note 172. While I think it is unlikely that such a conception of rights would be adopted in the foreseeable future, I would expect the principles defined in this section to aid in development of a need-focused jurisprudence. Thus, I have relied upon equal protection rather than due process concepts in order to emphasize redistribution to those most prejudiced by current welfare law. In keeping with Professor Simon’s analysis, I have proposed a framework intended to complement recent feminist literature and the “welfare jurisprudence of the New Deal social workers.” Simon, *supra* note 172, at 1485.

207. See generally *id.* I do not mean to overemphasize the significance of Justice Holmes’ dissent. The principal error of *Lochner* was not its use of economic theory, but rather its implied incorporation of a theory “which a large part of the country does not entertain,” *id.*, and which is inconsistent with the modern role of the Court (see *supra* note 29 and accompanying text). The *Lochner* majority would have barred states from effectively addressing problems of social welfare, and that narrow conception of state power remains unacceptable. Their error should not condemn all legitimate use of economic, political or moral theory. Such theory, however, is most effectively applied when derived from the existing body of law. See *supra* text accompanying notes 35-39.

208. *United States Dep’t. of Agric. v. Moreno*, 413 U.S. 528 (1973); *United States Dep’t. of Agric. v. Murry*, 413 U.S. 508 (1973).

209. *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973).

210. *Plyler v. Doe*, 457 U.S. 202 (1982).

211. See, e.g., *id.*, at 234 (Justice Blackmun stressed the state’s decision that “provides an education to some and denies it to others.”).

212. See J. ELY, *supra* note 12, at 11-41.

213. *Plyler v. Doe*, 457 U.S. at 235 (Blackmun, J., concurring).

This symbiotic relationship between the Court and the legislature²¹⁴ represents an important majoritarian constraint. It also relieves initial problems inherent in defining basic needs.²¹⁵ There is no reason to fear judicial imposition of innovative social insurance, since the principle itself depends on identification of a general legislative mandate. The Court would not be assuming an inappropriate activist role; rather, it would be in a familiar posture of protecting unpopular minorities from being left out of protective legislation or from becoming targets of legislative retreats.²¹⁶

The focus on fair distribution also should be distinguished from a broad claim that poverty is a suspect class. Because, as indicated above, there is an existing legislative effort to meet the needs of at least some of the poor, it generally should be understood that unfair classifications do not stem from hostility toward *all* of the poor. Hierarchical treatment of groups of poor people,²¹⁷ however, coupled with crude distinctions among those politically impotent groups,²¹⁸ warrants judicial protection for those excluded.²¹⁹

An emphasis on fairness parallels treatment given to other constitutional problems that have been addressed on an intermediate level. In analyzing rules of state apportionment, for instance, a generalized concern for fairness is a more accurate description of the judicial standard than a strict demand for equality.²²⁰ In a similar sense, durational residency requirements are reviewed in terms of a search for "reasonable" justifications.²²¹

214. See Michelman, *Pursuit*, *supra* note 15. He also noted this relationship.

215. A basic element of the early criticism directed at Michelman's article advocating use of the equal protection clause to secure a right to basic goods and services focused on the "elitism" involved in any decision where "minimum needs" were to be designated. See Winter, *supra* note 47. This problem is, of course, not eliminated by the emphasis on preexisting legislative mandates; the Court must still decide *which* legislation triggers its increased scrutiny. The Court still will need to identify "brutal needs" for this purpose. *Id.* at 52.

216. See, e.g., *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1974); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973).

217. See *supra* notes 66-71 and accompanying text.

218. See *supra* text accompanying notes 36 & 37. It should not matter whether the crude distinctions result from hostility or indifference.

219. See *Lyng v. Castillo*, 106 S. Ct. 2727 (1986). Note again the absence of "historical hostility" towards the nuclear family which the Court cited in support of its decision. Members of the Court, thus, continue to recognize the relevance of this distinction.

220. See *supra* text accompanying notes 193-94.

221. See, e.g., *Sosna v. Iowa*, 419 U.S. 393 (1975). Other efforts have been made to define the context in which durational residency requirements apply. Justice Marshall discussed these issues for the majority of the Court in *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974). As he noted there, many durational residency require-

Of course, it is important to acknowledge that concerns for fair apportionment or reasonable residency requirements are tied to identifiable protected interests. In order to distinguish welfare legislation from all other social and economic regulations, I am proposing that this fair distribution formula should be used only when recipients are faced with a brutal need. While this phrase is derived from judicial treatment of due process standards, it is also an apt description of the lines drawn by the Court to protect those excluded from basic goods and services.

The legitimacy of this focus on need depends on the level of generality at which it functions. Members of the Court have suggested extreme alternatives. At one end of the spectrum, Justice Stevens and Chief Justice Burger have advocated a single rational basis standard to replace the tiered analysis of equal protection claims.²²² This "unbridled" rational basis test, however, is seen as too general and risks movement "back toward the days of *Lochner v. New York*."²²³ At the other extreme, some have argued that prior cases must be very narrowly restricted to their facts.²²⁴ The decision to protect the interest of illegal alien children in an elementary school education could be, for example, seen as nothing more than an education case. Justice Powell, however, specifically noted his more general concern: "If the resident children of illegal aliens were denied welfare assistance, made available by government to all other children who qualify, this also — in my opinion — would be an impermissible penalizing of children because of their parent's status."²²⁵ The combination of equal protection and due process cases previously reviewed suggests an underlying concern for those faced with a denial of minimum essential goods and services. As a result, that is the appropriate level of generality for the operative principle I am seeking.

A principle of fair distribution defined in these terms is consistent with the dominant jurisprudence of this century.²²⁶ It represents a pragmatic adaptation of the principle of equal protection to the "new property" of the welfare state, and it does so in a manner that is consistent with the underlying democratic goals of the legislature. It

ments impinge to some extent on the right to travel. . . ." *Id.* at 256. The level of judicial scrutiny varies depending upon the interest affected by the residency requirement. In that case, access to a county hospital was an interest in "a basic necessity of life" that triggered use of a "compelling state interest test." *Id.* at 257-259.

222. These two justices most recently joined in this argument in *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). They would argue, for instance, that racial discrimination is almost always irrational because racial classifications generally lack any valid basis.

223. *Id.* at 455-78 (Marshall, J., concurring).

224. See, e.g., the reasoning of Justice White in *Cleburne*, 473 U.S. at 432. Compare this with Justice Marshall's approach. 473 U.S. at 456.

225. *Plyler*, 457 U.S. at 239 n.3.

226. See R. SUMMERS, *supra* note 21.

is also consistent with the philosophy that judicial protection should be exercised most actively on behalf of those not adequately protected by the majoritarian democratic process.²²⁷

The change in judicial philosophy that accompanied judicial acceptance of the New Deal²²⁸ resolved the basic question of economic control.²²⁹ In footnote four of the *Carolene Products* decision²³⁰ Justice Stone acknowledged that general sphere of legislative authority. He went on to identify those factors, including protection of the political process and "discrete and insular minorities," which narrowed the "scope for operation of the presumption of constitutionality."²³¹ Those who argue that government goods and services designed to meet basic minimum needs are "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation"²³² are showing deference to legislative control of the economy. Those who argue for strong welfare rights or that poverty is a suspect class²³³ are making assumptions derived from the activist side of footnote four. Denial of basic welfare is unique because it involves elements of both; as a result, an intermediate principle is needed.

Arguments for accepting an intermediate principle protecting claims to welfare benefits are based on the premise that the Court should identify those legal principles entitled to weight and affecting the outcome of its opinions. The Court continues to be influenced by the significance, in human terms, of the substantive claims affected by state action and reviewed under the fourteenth amendment. The Justices are appropriately moved by the brutal need of those unfairly denied fundamental assistance. In a coherent theory of constitutional decision making, factors that motivate court restrictions on legislative action should be identified in principled terms if they are to be perceived as legitimate.²³⁴

The historical tendency to dance around the issue of welfare rights can be understood as an example of Professor Gunther's "avoidance" concept.²³⁵ The Court is not prepared to enter the deep and murky

227. See *supra* text accompanying note 29.

228. The "switch in time that saved nine" was made by Justice Owen Roberts in the case of *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

229. See R. McCLOSKEY, *THE AMERICAN SUPREME COURT* 177 (1960).

230. *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

231. *Id.*

232. *Plyler*, 457 U.S. at 221 (Brennan, J., concurring). Words to this effect appear frequently in the Supreme Court's opinions.

233. See *supra* text accompanying notes 107-11.

234. See R. DWORKIN, *RIGHTS*, *supra* note 34, at 87-88.

235. See *supra* text accompanying notes 162-67.

waters of welfare rights, and there are substantial reasons for permitting greater legislative freedom in the welfare context than is tolerated when rights involving free speech, religious liberty, or racial equality are infringed. Principled expressions of legitimate concern for those unfairly denied essential goods or services, however, have been avoided through an ostensibly traditional search for rationality.²³⁶ Avoidance or abandonment of identifiable principles undercuts the Supreme Court's guiding role. The victims are those classes of potential welfare recipients who do not receive adequate protection from the legislative, administrative or lower judicial branches because of a lack of clear guidance from the Supreme Court. It is for their benefit that this issue should be called "from the battleground of power politics to the forum of principle."²³⁷

This principle of fair distribution to meet brutal needs should be distinguished from the argument that this society would benefit from an expanded welfare system. General arguments about whether or not welfare programs should be adopted or expanded may be advanced because of the social or economic results that would follow. Those arguments, however, boil down to evaluations of legislative policy and should be left in the hands of the legislature. The distinctive character of a principled argument is that it functions as an enduring part of the constitutional framework and applies independently of judgments about social policy.

This distinction does not mean that policy considerations can be ignored by the courts. On the contrary, an intermediate principle like the one I have described is most likely to be defeated by the social or economic policy judgments advanced *by the state*. Advocates challenging the legislative classification, however, could not rely on their own visions of how to promote the general public welfare, and would be restricted to arguments based on principle. The judicial role would be confined to a determination of whether the legislative policy interests outweigh that principle. The weight to be

236. See *supra* note 167. Chief Justice Burger and Justice Stevens both have suggested in recent decisions that all equal protection analysis should be seen as nothing more than a search for rationality. It is interesting to note that the same two Justices also would avoid difficult problems of statutory construction on the theory that "[w]henver a constitutional question is arguably presented, legislative intent should be interpreted so as to avoid reaching that constitutional issue." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (Burger, C.J., concurring); *United States v. Locke*, 471 U.S. 84 (1985) (Stevens, J., dissenting).

237. R. DWORKIN, *PRINCIPLE*, *supra* note 34, at 71. Professor Dworkin's argument: "We do better to work openly and willingly so that the national argument of principle that judicial review provides is better argument for our part. We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, some place, finally become questions of justice. I do not call that religion or prophecy. I call it law." *Id.*

given to this principle²³⁸ would become more clear through its application over time. The essential first step, however, is to acknowledge that the principle exists.

We have left the early, tentative days of *Flemming*²³⁹ when the Court struggled in obvious discomfort to come to grips with the new property of the welfare state. Safeguarding the distribution of aid to the poor is not of vital political interest to the majority,²⁴⁰ and that is one reason why judicial protection is appropriate. This appeal to principle is not intended to invoke visions of evolving standards of higher morality. The welfare state is not necessarily morally superior; it is, however, a fact of modern life. And for those no longer able to "Go West" to meet their basic needs, new standards of protection are necessary.

Supreme Court Justices cannot perform their roles by limiting constitutional status to those values most meaningful to their own privileged backgrounds.²⁴¹ The function of the Court should include protection of values which naturally arise as part of the current relationship between citizens and their government. Reliance on private charity ended in the seventeenth century with the Elizabethan Poor Laws.²⁴² Belief that income followed moral superiority should have ended with the Victorian era.²⁴³ The present challenge is not one of forging new rights through a renewed spirit of judicial activism. It is rather an appeal to identify constitutional principles consistent with the era in which we live.

238. See R. DWORKIN, *RIGHTS*, *supra* note 34.

239. 363 U.S. 603 (1960); see *supra* text accompanying notes 90-96.

240. That becomes increasingly significant as the poor become an increasingly distinct minority within society.

241. There continues to be a risk that judicial review would become a form of rule by aristocracy. See R. DAHL, *DEMOCRACY IN THE UNITED STATES* 493 (1977). As noted by Ely, "the list of values the Court and the commentators have tended to enshrine as fundamental is a list with which the readers of this book will have little trouble identifying: expression, association, personal autonomy, even the right not to be locked in a stereotypically female sex role and supported by one's husband. But watch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food, or housing. Those are important, sure, but they aren't *fundamental*." J. ELY, *supra* note 12, at 59 (citing *Rodriguez*, 411 U.S. at 37 (Marshall, T., dissenting); *Dandridge*, 397 U.S. at 508; Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 144 (1976); Tushnet, " . . . And Only Wealth Will Buy You Justice" *Some Notes on the Supreme Court*, 1972 Term, 1974 Wis. L. REV. 177, 190.

242. See Riesenfeld, *supra* note 52.

243. See Woodard, *supra* note 48.

CONCLUSION

Theoretical alternatives are needed to resolve the conflict between welfare rights and mere rationality standards of fourteenth amendment analysis. Arguments for a right to receive welfare benefits are compelling in a political context. They are unlikely, however, to receive majority support from the current Supreme Court. Mere rationality standards (and neutral principle alternatives), however, are inconsistent with the appropriate concern shown by the Court when denial of monetary assistance, food or elementary education occurs in the context of recipients with recognized brutal needs.

Hiding these issues under a guise of neutrality or rationality alters the character of the public debate which follows. Identification of substantive legal principles which motivate Court action must precede valid and coherent fourteenth amendment analysis. In keeping with the legal theory that has guided the judiciary through most of this century, the Court should recognize explicitly an intermediate principle that basic government goods and services must be distributed fairly to those in need.